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No. 03-

IN THE

Supreme Court of the United States

AMERICAN TELESERVICES ASSOCIATION, MAINSTREAM MARKETING SERVICES, INC., AND TMG MARKETING, INC.,
Petitioners,

v.

FEDERAL TRADE COMMISSION, FEDERAL COMMUNICATIONS COMMISSION, AND UNITED STATES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI VOLUME I

ROBERT CORN-REVERE *
RONALD G. LONDON
JEFFREY L. FISHER
KAVITA AMAR
SONJA WEST
DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005
(202) 508-6600

SEAN R. GALLAGHER
HOGAN & HARTSON LLP
1200 17th Street, Suite 1500
Denver, Colorado 80202
(303) 899-7300

* Counsel of Record

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the First Amendment permits the government to impose regulations that discriminatorily restrict commercial speech in order to serve an asserted interest unrelated to the commercial nature of the speech.

2. Whether the national "do-not-call" registry satisfies intermediate First Amendment scrutiny where the rules specifically exempt, or are inapplicable to, political, charitable and other noncommercial callers, as well as certain commercial telemarketers, and where less restrictive regulations already empower consumers to block unwanted calls.

3. Whether the requirement that commercial telemarketers pay certain fees as a pre-condition for making calls operates as an unlawful tax on protected speech.

PARTIES TO THE PROCEEDINGS

This Petition seeks review of two cases that were consolidated in the United States Court of Appeals for the Tenth Circuit. In the first case, *Mainstream Marketing Services, Inc. v. Federal Trade Commission,* No. 03-1429, Petitioners American Teleservices Association, Mainstream Marketing Services, Inc., and TMG Marketing, Inc. are plaintiffs-appellees. The defendant-appellant, and the Respondent here, is the Federal Trade Commission ("FTC").* The United States also intervened in the matter. In the second case, *Mainstream Marketing Services, Inc. v. Federal Communications Commission*, No. 03-9571, Petitioners named above are the petitioners. The Respondents here, as below, are the Federal Communications Commission ("FCC") and the United States.

RULE 29.6 STATEMENT

Each of the Petitioners states that it has no parent company and no publicly held company owns more than ten percent of its stock.

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* In the district court where review of the FTC rules originated, the following individuals initially were named defendants in their official FTC capacities: Timothy J. Muris, Chairman; Sheila F. Anthony, Commissioner; Mozelle W. Thompson, Commissioner; Orson Swindle, Commissioner; Thomas B. Leary, Commissioner; J. Howard Beales, III, Director, Bureau of Consumer Protection. In an amended complaint, the filing of which the FTC consented to, Petitioners dismissed these individuals, and the Tenth Circuit decision for which review is sought lists them only as "defendants," and not "defendant-appellants." Accordingly, the individual former defendants are not parties to the current proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the Tenth Circuit in *Mainstream Marketing Servs., Inc. v. Federal Trade Comm'n*, Nos. 03-1429 & 03-9571.

OPINIONS BELOW

The Court of Appeals' opinion in the consolidated appeals at issue here is reported at 358 F.3d 1228 (10th Cir. 2004), App. 1a-38a, and its earlier opinion granting a stay pending appeal is reported at 345 F.3d 850 (10th Cir. 2003). App. 39a-57a. The District Court's decision in *Mainstream Marketing Services, Inc. v. Federal Trade Commission* is reported at 283 F.Supp.2d 1151 (D. Colo. 2003), App. 80a-112a, and its decision denying the FTC's request for a stay is

reported at 284 F.Supp.2d 1266 (D. Colo. 2003). App. 61a-79a. The FTC order in *Amended Telemarketing Sales Rule* is reported at 68 Fed. Reg. 4580 (2003), App. 159a-575a, and the order in *Amended Telemarketing Sales Rule Fees* is reported at 68 Fed. Reg. 45134 (2003). App. 113a-158a. The FCC order in *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991* is reported at 18 FCC Rcd. 14014 (2003). App. 585a-857a.

STATEMENT OF JURISDICTION

The Court of Appeals issued its opinion on February 17, 2004. This Court has jurisdiction under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment provides in pertinent part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

Relevant statutory and regulatory provisions are reproduced at App. 949a-1023a.

STATEMENT OF THE CASE

This case is a cautionary example of what happens when federal agencies allow perceived political imperatives to override constitutional concerns. Since 1992, the FCC, later joined by the FTC, had company-specific "do-not-call" rules requiring telemarketers to honor individual requests to discontinue calling. The vast majority of telemarketers followed these rules, and most consumers who used them found they were effective in limiting the number of calls they received. Unfortunately, most people were not aware of the rules since neither agency ever publicized or enforced them.

Notwithstanding widespread public ignorance and lack of agency enforcement of the company-specific "do-not-call" rules, the FTC announced in late 2001 that it intended to adopt a national "do-not-call" registry ("DNCR") as part of a

new "privacy agenda." It adopted rules implementing the DNCR in December 2002, just as the FCC was conducting a rulemaking on the subject. The FCC followed the FTC and adopted DNCR rules in July 2003. Under the FTC and FCC rules, once a consumer signs up for the registry, a blanket preemptive ban is imposed on certain commercial telemarketers as designated by the government. At the same time they adopted these rules, however, the agencies also reaffirmed that company-specific rules can be effective. The public enthusiastically supported the DNCR that—unlike the company-specific rules – is now widely promoted.

However, as the District Court found, the DNCR violates basic First Amendment principles by singling out commercial speech for special burdens without any justification for treating such speech differently than charitable, political, or other noncommercial speech. The discriminatory restrictions are particularly egregious because both the FTC and FCC concluded that all telemarketing calls, regardless of their subject, have an identical impact on privacy. The DNCR also fails this Court's First Amendment test for upholding regulations that restrict truthful commercial speech about lawful products, and it imposes an unlawful tax on speech.

A. Statutory and Regulatory Background

The DNCR is the product of two federal agencies acting pursuant to two different federal laws.

1. The Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994, 15 U.S.C. § 6101, *et seq.* ("Telemarketing Act"), authorizes the FTC to promulgate rules prohibiting "deceptive telemarketing . . . and other abusive telemarketing acts." *Id.* § 6102(a)(1). Though it adopted company-specific "do-not-call" rules mirroring FCC rules (described below) that were already in place, the FTC through 2000 used its Telemarketing Act authority almost exclusively to regulate telemarketing "fraud," a problem it considered

entirely distinct from "unwanted calls" made by legitimate telemarketers. *The Know Your Caller Act of 1999 and the Telemarketing Victim Protection Act of 1999: Hearing on H.R. 3100 and H.R. 3180 Before the House Comm. on Commerce Subcomm. on Telecommunications, Trade, and Consumer Protection,* 106th Cong. 20, 27 (2000) (only about ten percent of the telemarketing complaints the FTC receives concern unwanted calls).

The earlier adopted Telephone Consumer and Protection Act of 1991, 47 U.S.C. § 227 ("TCPA"), authorized the FCC to address the issue of unwanted telemarketing calls and directed the agency to consider whether unsolicited charitable and political calls should be regulated as well. *Id.* § 227(c)(1)(D). In initially implementing this law, the FCC declined to create any blanket "do-not-call" registry, and instead adopted company-specific rules in order to preserve a balance between First Amendment rights and an interest in privacy. In an earlier review of this issue the FCC had taken the position that "all solicitation calling—whether for charitable, political, or business purposes—involves similar privacy implications" and that any "do-not-call" registry that focused on commercial telemarketing would "raise serious constitutional questions [absent] significant practical differences between unsolicited commercial and noncommercial calls." *Unsolicited Telephone Calls*, 77 F.C.C.2d 1023, 1035 (1980). When it adopted company-specific "do-not-call" rules, the FCC noted that any rule prohibiting all commercial telemarketers from contacting a consumer would frustrate consumers' "ability to choose among those . . . from whom they do and do not wish to hear." *Rules and Regulations Implementing the Telephone Consumer Protection Act,* 7 FCC Rcd. 8752, 8761, 8766 (1992).

The agencies did virtually nothing to publicize consumers' rights under these initial rules to block unwanted calls—and even less to enforce the company-specific rules. From 1992

to 2003, the FCC issued only one decision that involved a violation, and in that lone case found only two calls that contravened a "do-not-call" request. *See Consumer.Net v. AT&T Corp.*, 15 FCC Rcd. 281, 288-89, 295-99 (1999). As noted, the FTC focused on different issues involving telemarketing fraud, and pursued alleged "do-not-call" violations only as a rare afterthought.

2. In December 2002 the FTC adopted new rules for creating and enforcing a DNCR even though the record showed most consumers had been unaware of the company-specific rules. For example, one nationwide survey presented to the FTC indicated less than five percent of consumers were aware of the right to block unwanted calls. *Telemarketing Sales Rule "Do-Not-Call Forum*, Matter No. P994414, at 93 (Jan. 11, 2003).

When it became clear the FTC was intent on adopting rules implementing a DNCR, the FCC also launched a rulemaking to revise its rules under the TCPA. *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 17 FCC Rcd. 17459 (2002). App. 858a-947a. In doing so, it noted that it had received over 11,000 TCPA complaints in the previous two years. However, after being presented with data that approximately two-thirds of the complaints had nothing to do with unwanted calls, the FCC acknowledged "the increasing number of inquiries and complaints about telemarketing practices should not form the basis upon which we revise or adopt new rules under the TCPA." *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14140 (2003). App. 799a-800a. Instead, it interpreted a congressional directive to consult with the FTC and "maximize consistency" between the respective agencies as a command to replicate the FTC rules. *Id.* at 14033, 14059. App. 617a, 663-664a.

The FCC and FTC "do-not-call" rules prohibit certain commercial telemarketers from calling consumers listed on the

DNCR unless the telemarketer has obtained express prior written consent from, or has an "established business relationship" with, the called party. 47 C.F.R. §§ 64.1200(c), (f)(9)(i)-(ii); 16 C.F.R. § 310.4(b)(1)(iii)(B). The rules do not restrict political calling of any nature, by any person or entity, nor do they limit charitable solicitations that come from in-house callers, calls to conduct market research, and calls from non-charitable non-profit entities. The DNCR also exempts charitable solicitations by for-profit fundraisers, but such calls are subject to the company-specific rules. 16 C.F.R. § 310.6(a); *Amended Telemarketing Sales Rule* ("*Amended Rule*"), 68 Fed. Reg. 4580, 4584-85, 4587, 4636-37 (2003). App. 178a-181a, 189a-190a, 394a-396a.

The FTC explained its decision to distinguish between commercial and charitable calls on legal rather than evidentiary grounds, taking the position that the First Amendment extends "a higher degree of protection . . . to charitable solicitation than to commercial solicitation." *Id.* at 4586. App. 185a. Citing comments that "charitable fundraising is fully protected speech, and that attempts to regulate it are subject to the highest level of scrutiny," the FTC expressed confidence the restrictions placed on commercial telemarketers would be subject to—and would survive—reduced scrutiny under *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n,* 447 U.S. 557 (1980). 68 Fed. Reg. at 4635. App. 387a-389a. The FCC employed the same analysis to reach an identical conclusion. 18 FCC Rcd. at 14052, 14059. App. 651a-652a, 661a-663a.

The agencies did not seriously defend their disparate treatment of commercial and noncommercial calls on the basis of any different privacy impact. Indeed, the FTC candidly echoed the FCC's earlier finding that "the encroachment upon consumers' privacy rights by unsolicited calls is not exclusive to commercial telemarketers; consumers are disturbed by unwanted calls regardless of whether the caller is seeking to

make a sale or to ask for a charitable contribution." *Amended Rule*, 68 Fed. Reg. at 4637, App. 396a; *see also id.* at 4629-30 (discussing privacy issues without distinguishing between commercial and noncommercial callers). App. 365a-369a. The FCC, notwithstanding Congress' initial direction that it study whether "do-not-call" rules should apply equally to noncommercial telemarketers, explicitly decided to "not seek comment on the [DNCR's] exemption as it applies to political and religious speech." 17 FCC Rcd. at 17479. App. 896a. Nor did the agencies try to justify the commercial-noncommercial distinction based on demonstrable differences in compliance. The FTC acknowledged it had no "experience" concerning whether commercial telemarketers ignore "do-not-call" requests more often than noncommercial callers. *Id.* at 4637. App. 396a-398a.

3. Congress retroactively authorized funding for the "do-not-call" registry, *see* Do-Not-Call Implementation Act, Pub. L. No. 108-10, 7 Stat. 557 § 2 (2003), App. 949a-952a, since the FTC had enacted rules before it had budgeting. The FTC first estimated it would cost $5 million to administer the DNCR, but later revised that to $18.1 million, a sum representing more than 10 percent of the agency's overall annual budget. After being granted authority for the entire $18.1 million, the FTC hired a contractor to create and administer the DNCR for $3.5 million while earmarking the remainder to upgrade computer systems used to respond generally to fraud-related complaints. *Amended Telemarketing Sales Rule Fees* ("*Amended Fees Rule*"), 68 Fed. Reg. 45134, 45141 (2003). App. 113a, 142a-145a.

Congress authorized the FTC to recoup the $18.1 million by charging commercial telemarketers fees in conjunction with the DNCR. Commercial telemarketers wishing to place calls to consumers who did not place their numbers on the DNCR must pay an annual registry fee before placing any outbound telephone calls. 16 C.F.R. § 310.8(a)-(b). The fee

currently is $25 for every area code in which telemarketers wish to place calls, up to a cap of $7,375, but there is no charge for the first five area codes and charitable and political telemarketers may obtain the DNCR free of charge.[1]

B. Procedural History

1. Immediately after the FTC rules appeared in the Federal Register, Petitioners filed a complaint for declaratory and injunctive relief in the United States District Court for the District of Colorado alleging, *inter alia,* that the DNCR violates the First Amendment. The District Court agreed, applying *Central Hudson* to determine that neither of the interests asserted by the government justified creating the DNCR. Specifically, the court found the DNCR does not legitimately advance the government's interest in protecting privacy because "unwanted calls seeking charitable contributions are as invasive to [] privacy . . . as unwanted calls from commercial telemarketers," 283 F.Supp.2d at 1166, App. 103a, and regulations may not distinguish between commercial and noncommercial speech if both have the same effect on the asserted interest. *Id.* at 1165-68 (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993)). App. 101a-106a. The court dealt similarly with the government's asserted interest in preventing "abusive and fraudulent" telemarketing practices, finding "there is no evidence in the administrative record or before this court that abusive and fraudulent telemarketing practices are more often instigated by commercial telemarketers than by charitable telemarketers." *Id.* at 1167. App. 104a. The District Court later denied the FTC's request for a stay, again rejecting the FTC's

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[1] *Id.* § 310.8(c). The FTC recently proposed, after scarcely more than six months' experience with the DNCR, to raise fees to $45 per area code, capped at $12,375, having found that more entities than expected gain free access to the registry under the noncommercial and small scope (five area codes or fewer) exceptions, while fewer entities than expected pay for full access. *Telemarketing Sales Rule Fees*, 69 Fed. Reg. 23701 (2004).

assertion that its interest in preventing "abusive telemarketing practices" justified the DNCR, and explaining "*the FTC has gathered no evidence*" regarding whether commercial telemarketers are more likely than noncommercial telemarketers to ignore company-specific "do-not-call" requests. 284 F.Supp.2d at 1173 (emphasis original). App. 71a.

2. After the FCC rules appeared in the Federal Register, Petitioners sought review in the United States Court of Appeals for the Tenth Circuit, alleging that the rules violate, *inter alia*, the First Amendment. At the same time, Petitioners requested that the FCC stay the effectiveness of its new rules during judicial review. The FCC denied the request shortly thereafter, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 16973 (2003), App. 582a, and Petitioners promptly filed a motion with the Tenth Circuit for expedited stay pending appeal, which that court denied. *Mainstream Mktg. Servs., Inc. v. FCC*, No. 03-9571, Order (10th Cir. Sept. 26, 2004). App. 58a-60a. Petitioners then filed an application to stay the rules with the Circuit Justice, but the application was denied.

3. The Tenth Circuit consolidated both actions, as well as two others challenging the FTC and FCC "do-not-call" rules.[2] It also stayed the decisions invalidating the rules. 345 F.3d 850. App. 39a-57a. It ultimately upheld the DNCR in its entirety, holding that, under *Central Hudson*, the interest in

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[2] A different set of plaintiffs also challenged the FTC rules in another district, and the court invalidated them on grounds the FTC lacked statutory authority. *See U.S. Security v. FTC*, 282 F.Supp.2d 1285 (W.D. Okla. 2003). The Tenth Circuit reversed that decision in part on the basis of intervening congressional legislation. 358 F.3d at 1250. App. 37a. Similarly, a different entity, the Competitive Telecommunications Association, challenged the FCC rules on grounds the DNCR's established business relationship exception gives incumbent telecommunications providers too great an advantage and is inconsistent with Communications Act. The Tenth Circuit rejected that challenge. *Id.* at 1248-50. App. 33a-36a. None of these parties are petitioners here.

protecting individual privacy and preventing telemarketing abuse justified the new rules. The Tenth Circuit rejected the District Court's reading of *Discovery Network* and held it is immaterial whether unrestricted noncommercial speech affects privacy in the same way as the commercial speech banned by the rules. The court reasoned that *Discovery Network* merely held that "a regulation that has only minimal impact on the identified problem cannot be saved simply because it targets commercial speech," 358 F.3d at 1245, App. 28a, and "so long as a commercial speech regulation materially furthers its objectives, underinclusiveness is not fatal." *Id.* at 1239. App. 16a.

Although deceptive and abusive practices are not the subject of the "do-not-call" rules or relevant to this challenge, the Tenth Circuit asserted "commercial callers are more likely than non-commercial callers to engage in deceptive practices." *Id.* at 1241. App. 20a. The court based this conclusion solely on what the FTC perceived to be the "incentives" of various types of telemarketers. However, that agency neither sought nor cited actual evidence of higher abuse in the commercial context. *Id.* It also failed to discuss the more direct relevance of other Telemarketing Act rules that are not the subject of this case. Finally, the Tenth Circuit rejected the challenge to the "do-not-call" registry fees. *Id.* at 1247-48. App. 30a-33a.

REASONS FOR GRANTING THE WRIT

This Court should grant review in order to decide whether it is constitutional for the government to discriminate against truthful commercial speech simply because it is commercial where the alleged harm is the same for all speech. Specifically, this case raises the question of whether the government has greater authority to restrict what it presumes to be "unwanted speech" if the speech is commercial rather than non-commercial. The Tenth Circuit's misuse of commercial speech doctrine to advance a distinctly noncommercial

interest highlights a major doctrinal issue this Court has reserved several times in recent cases, most notably in *Discovery Network*. The DNCR blocks commercial calls despite a lack of persuasive evidence that they intrude on residential tranquility any differently from any other unsolicited calls, solely because the government concluded it has greater latitude—both politically and constitutionally—to regulate commercial speech. Contrary to the Tenth Circuit's assumption, the DNCR does not reflect individual preferences regarding "unwanted" calls, since the government decided for consumers which calls the registry would block. Review by this Court also is essential to consider whether the Tenth Circuit properly construed this Court's jurisprudence under *Central Hudson* and its progeny, and whether the government may impose a fee that operates as a tax on speech.

I. THE COURT SHOULD GRANT REVIEW BECAUSE THIS CASE PRESENTS A SIGNIFICANT DOCTRINAL QUESTION OF COMMERCIAL SPEECH ON WHICH GUIDANCE IS NEEDED

A. There is a Growing Trend Toward Regulating Commercial Speech in the Name of Privacy

This case arises from a recent trend among governmental entities to restrict commercial speech discriminatorily in the name of privacy. Technological advancements making direct communication with consumers more efficient, cost-effective and precise have spurred a trend toward increased federal and state regulation of marketing communications. Regulations such as the DNCR do not merely restrict the ability to market directly to consumers telephonically; rather they have the potential to eliminate an entire channel of communication.

Creation and enforcement of the DNCR is but one of many ways the government is inserting itself between businesses and individuals. In addition to the federal DNCR, most states

have established "do-not-call" lists—some even after creation of the DNCR—virtually all of which single out commercial speech.[3] As a result, several lower courts are presented with issues similar to those raised here.[4] The government also is actively considering the merits of a "do-not-email" registry modeled on the DNCR, which would target commercial email. *Definition, Implementation and Reporting Requirements Under the CAN-SPAM Act*, 69 Fed. Reg. 11776 (2004). Courts already are confronting the constitutional issues arising from such regulation.[5] Whatever policy arguments may be advanced for or against such laws, they necessarily raise important constitutional questions that lie at the heart of this Petition.

B. Asserted Privacy Interests Do Not Implicate the Commercial Speech Doctrine

1. *Privacy is the Only Relevant Interest that the DNCR Purports to Serve*

The government rests its constitutional defense of the DNCR on application of the commercial speech doctrine, yet the interests it purports to serve are not germane. The Tenth Circuit erroneously identified the government's interests as (1) protecting residential privacy and (2) protecting consumers from the risk of fraudulent or abusive solicitation. 358 F.3d at 1237. App. 13a-14a. However, the "do-not-call" issue is entirely unrelated to questions of consumer fraud and

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[3] *See, e.g.*, 18 FCC Rcd. at 14024 nn.44-45. App. 602a-603a. *See also, e.g.*, N.C. Gen. Stat. §§ 75-101, 75-103; Va. Code Ann. 59.1-510, 59.1-514.

[4] *See e.g., Colorado Citizens for Free Speech v. Gifford*, No. 02-RB-1192 (D. Colo.); *Fraternal Order of Police v. Stenehjem*, 287 F.Supp.2d 1023 (D. N.D. 2003). *Cf. National Fed'n of the Blind v. FTC*, No. 04-1378 (4th Cir.).

[5] *E.g., White Buffalo Ventures, LLC v. University of Texas at Austin*, No. A-03-CA-296-SS (W.D. Tex. Mar. 22, 2004).

abuse that are addressed by other statutory sections and regulations not at issue here.[6] This challenge to the DCNR involves *only* restrictions imposed on truthful, non-misleading speech about lawful products. If that were not the case, the *Central Hudson* test would not apply at all, to whatever extent it is appropriate in this case.

The Tenth Circuit's confusion on this point arose from the fact that the DNCR was the product of two federal agencies construing two different laws. The Telemarketing Act, under which the FTC acted, does not mention the "do-not-call" issue at all and focuses almost entirely on issues of fraud. For that reason, the United States District Court for the Western District of Oklahoma held that the FTC exceeded its statutory authority in adopting the DNCR.[7] The TCPA, on the other hand, specifically authorized the FCC to adopt "do-not-call" rules, but was predicated on "the legitimacy of telemarketing industry." *See Rules and Regulations Implementing the Telephone Consumer Protection Act*, 7 FCC Rcd. 8752, 8753 (1992). It directed the FCC to ensure that any "do-not-call" regulations maintain an appropriate balance between commercial interests and privacy concerns while meeting constitutional standards.[8] Regardless of how one frames the

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[6] *See* 16 C.F.R. §§ 310.3, 310.4(a), 310.4(b)(1)(i), 310.4(c)-(e); 47 C.F.R. §§ 64.1200(b)-(c)(1), 64.1200(d)(4). *See also* 18 U.S.C. §§ 2325-2327.

[7] *U.S. Security*, 282 F.Supp.2d at 1290-92 (Telemarketing Act did not empower FTC to adopt DNCR). As originally enacted, the Act was concerned with "unscrupulous activities from which no one benefits but the perpetrator" and sought "equitable balance between . . . stopping deceptive (including fraudulent) and abusive telemarketing activities and not unduly burdening legitimate businesses." H. REP. 103-20 at 4, 1993 U.S.C.C.A.N. 1626, 1629. The *U.S. Security* decision, however, was rendered moot after Congress retroactively ratified the DNCR. 358 F.3d at 1250. App. 37a.

[8] Senate Report (Commerce, Science and Transportation Committee) No. 102-177, Oct. 8, 1991, at 6-7 ("The legislation directs the FCC to

privacy issue, however, it is not a question that implicates the commercial speech doctrine.

2. *The Asserted Privacy Interest Has Nothing to Do With Commercial Speech*

This Court has emphasized that the First Amendment "includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker's message may be offensive to his audience." *Hill v. Colorado*, 530 U.S. 703, 716 (2000). Although it has recognized residential tranquility as a legitimate governmental concern, [9] this Court has never held that an interest in avoiding unwanted speech is different or more important when the speaker is seeking to communicate a commercial message as distinguished from a noncommercial one. Thus, in *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 72 (1983), the Court invalidated a restriction on mailing unsolicited contraceptive advertisements designed "to protect those recipients who might potentially be offended." At bottom, the interest in shielding "unwilling listeners" is the same regardless of whether speech is commercial, political or charitable. In all instances, regulations intended to protect privacy must be

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balance individual privacy rights . . . and commercial freedoms of speech and trade. The Committee expects the Commission will issue regulations that protect subscribers' privacy rights without intruding unnecessarily and inappropriately on the First Amendment rights of the speaker.").

[9] Past decisions have emphasized that the balance between the interests of would-be speakers and their intended listeners is delicate. *E.g.*, *Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 163 (2002) ("there must be a balance between these interests and the effect of the regulations on First Amendment rights"); *Consolidated Edison Co. of New York v. Pub. Serv. Comm'n*, 447 U.S. 530, 537, 541 (1980) (striking down restriction on billing inserts based on asserted need to protect residential privacy interests); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 208 (1975).

both narrow *and* neutral. *Hill*, 530 U.S. at 723 (upholding restriction on "sidewalk counselling" because it "applies equally to used car salesmen, animal rights activists, fund-raisers, environmentalists and missionaries"); *Discovery Network*, 507 U.S. at 428 ("prohibition against the use of sound trucks emitting loud and raucous noise is permissible if it applies *equally* to music, political speech *and advertising*") (emphasis added); *Ward v. Rock Against Racism*, 491 U.S. 781, 795 (1989) (regulation denied government ability "to vary the sound quality or volume based on the message being delivered"); *Carey v. Brown*, 447 U.S. 455, 465 (1980) ("nothing in the content-based labor-nonlabor distinction has any bearing whatsoever on privacy").

The Tenth Circuit held that the DNCR is a valid restriction on commercial speech because consumers themselves decide to place their phone numbers on the registry. 358 F.3d at 1242. App. 21a-22a. According to the court below, the only speech that is blocked is—by definition—unwanted. But this conclusion is not supported by the commercial speech doctrine and it seriously mischaracterizes both the record and decisions of this Court on which the Tenth Circuit relied. In *Rowan v. United States Post Office Dept.*, 397 U.S. 728, 734 (1970), for example, the Court upheld a postal regulation that operates almost exactly like the company-specific requirements (and unlike the DNCR) because it allowed the addressee "complete and unfettered discretion in electing whether . . . he desired . . . further material from a particular sender." As the District Court pointed out, the government through the DNCR selects which callers are prohibited from speaking to those who place their numbers on the registry. *See* 283 F.Supp.2d at 1163 ("mechanism purportedly created by the FTC to effectuate consumer choice instead influences consumer choice"). App. 98a. Similarly, in *Martin v. City of Struthers*, 319 U.S. 141, 144 (1943), this Court struck down a ban on door-to-door solicitation because it "substitute[d] the judgment of the community for the judgment of the individ-

ual householder." While the *Martin* Court indicated homeowners could erect "no solicitation" signs without violating the Constitution, the ordinance would have offended the First Amendment if it permitted residents only to erect "no solicitation" signs that selectively barred speakers disfavored by the town council. *Cf. Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Ultimately, constitutional protection is based on the principle that "the speaker and the audience, not the government, assess the value of the information presented." *Edenfield v. Fane*, 507 U.S. 761, 767 (1993).

The Tenth Circuit's assumption that the commercial calls blocked by the DNCR are necessarily "unwanted" because consumers opt in to the registry begs the constitutional question presented here. The FTC specifically acknowledged that "consumers are disturbed by unwanted calls regardless of whether the caller is seeking to make a sale or to ask for a charitable contribution." *Amended Rule*, 68 Fed. Reg. at 4637. App. 396a-397a. Likewise, the FCC has found "all solicitation calling—whether for charitable, political, or business reasons—involves similar privacy implications" and that there is no evidence to show "subscribers would find an advertising message more offensive than a request for a charitable contribution or a political message or solicitation." *Unsolicited Telephone Calls*, 77 F.C.C.2d at 1035.

Whether a particular call is or is not welcome depends not on its commercial or non-commercial nature but on the interests of the individual telephone subscriber, which the government should not presume to supplant. As this Court has explained, a "'consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate.'" *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 481-482 (1995) (quoting *Virginia Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976)). The

question then, is whether the government may use commercial speech doctrine to presume which calls a consumer would prefer to receive.

C. The Court Should Articulate Clear Rules for When Government Can Impose Special Burdens on Commercial Speech

The essence of this case is whether government can single out commercial speech for special regulation simply because it is commercial. When the FTC Chairman announced the DNCR's adoption he forthrightly admitted that his agency proceeded on the assumption that "charities and religions have First Amendment rights that others don't have." Remarks of Chairman Timothy K. Muris, FTC Press Conference, Dec. 18, 2002. The FTC confirmed that its regulations target commercial telemarketers because the agency believes the First Amendment extends "a higher degree of protection . . . to charitable solicitation than to commercial solicitation." 68 Fed. Reg. at 4586. App. 185a. The FCC declined even to receive comments on noncommercial calls, 17 FCC Rcd at 17479, App. 896a, and both agencies assumed the DNCR rules would need to satisfy only the relaxed scrutiny of *Central Hudson*. 68 Fed. Reg. at 4635; App. 387a-389a; 18 FCC Rcd. at 14052, 14059. App. 651-652a, 661a-663a.

Although the Court has raised this issue in various cases, it has not definitively resolved whether the government has the same leeway in regulating commercial speech when it seeks to advance interests unrelated to whether the "harm" involved flows from the commercial nature of the speech. The most directly focused examination of the issue came in *Discovery Network*, where a city banned commercial but not noncommercial newsracks from public property based on its stated interest in preserving esthetics and safety. This Court held the law was "an impermissible means of responding to th[ese] admittedly legitimate interests" because it "place[d] too much importance on the distinction between commercial

and noncommercial speech." 507 U.S. 424. Even if "every decrease in the number of [newsracks on public property] necessarily effects an increase in safety and an improvement in the attractiveness of the cityscape," this Court explained, that did not justify singling out commercial newsracks because they "are no more harmful than the permitted [noncommercial] newsracks, and have only minimal impact on the overall number of newsracks on the city's sidewalks." *Id.* at 418.

Despite that finding, *Discovery Network* "expressly reserve[d] the question whether regulations *not directed at the content of commercial speech or adverse effects stemming from that content* should be evaluated under the standards applicable to regulations of fully protected speech." *Id.* at 436 (Blackmun, J., concurring) (emphasis added). Because the city's law failed *Central Hudson*'s intermediate scrutiny test, the *Discovery Network* Court did not decide whether "more exacting review" should apply when the government regulates commercial speech for a noncommercial reason, such as esthetics or public safety. *Id.* at 416 n.11.

Subsequent decisions have utilized similar reasoning and continued to leave this issue open. In *Rubin*, this Court examined a regulation prohibiting the printing of alcohol content on beer labels in order to impede brewers' "strength wars." While Justice Stevens would have ruled squarely that *Central Hudson* should not apply where a regulation "neither prevents misleading speech nor protects consumers from . . . incomplete information," 514 U.S. at 491-92 (Stevens, J., concurring), the remainder of this Court found the regulation invalid under *Central Hudson* and thus deemed it unnecessary to consider whether this type of a restriction "might be tolerated in the commercial speech area" in situations where it would not ordinarily be permitted. 514 U.S. at 482.

The next year, in *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), this Court invalidated a state law that

prohibited the advertising of liquor prices but again left unresolved the ultimate applicability of *Central Hudson* to such a restriction on truthful, nonmisleading speech. A three-justice plurality stated, "[t]he mere fact that messages propose commercial transactions does not in and of itself dictate the constitutional analysis that should apply to decisions to suppress them." *Id.* at 501. It added that "when a State entirely prohibits the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process, there is far less reason to depart from the rigorous review that the First Amendment generally demands." *Id.* A four-justice plurality added that this Court reviews a restriction on commercial speech that "serves an end unrelated to consumer protection" with "special care, mindful that speech prohibitions of this type rarely survive constitutional review." *Id.* at 504 (quotation and citation omitted). Justice Thomas concurred in the judgment on the ground that a governmental interest in suppressing truthful, nonmisleading speech "can no more justify regulation of 'commercial' speech than it can justify regulation of 'noncommercial' speech." *Id.* at 518. Justice Scalia also expressed "discomfort" with the *Central Hudson* test, but since he agreed the law at issue failed even that test, he found it unnecessary to go further. *Id.* at 517-18 (Scalia, J., concurring in part and concurring in the judgment).

In *Greater New Orleans Broadcasting Ass'n, Inc. v. United States*, 527 U.S. 173, 184 (1999), this Court again invalidated a governmental restriction on truthful, nonmisleading commercial speech and again reserved the question whether a test stricter than *Central Hudson* ought to apply. More recently, in *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 554 (2001), this Court struck down yet another such law under *Central Hudson* while acknowledging "several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases." Justice Kennedy, joined by Justice Scalia, wrote separately to

note "continuing concerns that the [*Central Hudson*] test gives insufficient protection to truthful, nonmisleading commercial speech." *Id.* at 572 (concurring in part and concurring in the judgment).

In *Discovery Network* itself, Justice Blackmun warned that unless this Court made clear that *Central Hudson*'s relaxed scrutiny applies only to commercially motivated restrictions on commercial speech, "*Central Hudson*'s chickens [would] come home to roost."[10] This is exactly what happened in the Court of Appeals here. The Tenth Circuit's decision allows the government to single out and regulate truthful, non-misleading commercial speech in order to protect people from "unwanted [telephone intrusions] into their homes," 358 F.3d at 1245, App. 27a, a governmental interest that is wholly unrelated to preserving the fair bargaining process and certainly not limited to commercial communications. The decision thus rests squarely on the notion that government may regulate commercial speakers in ways it cannot regulate noncommercial entities.

However, the patchwork of exemptions and selective applications of the DNCR fails even to address whether particular telemarketing calls are accurately classified as "commercial." For example, noncommercial speakers are permitted to make calls to sell products, while commercial callers who want only to promote a positive public image are banned.[11] Similarly, commercial calls to sell newspapers and

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[10] 507 U.S. at 436 (Blackmun, J., concurring). Earlier, the Chief Justice warned that the Court's treatment of this issue was "a virtual Tower of Babel, from which no definitive principles can be clearly drawn." *Metromedia v. City of San Diego*, 453 U.S. 490, 569 (1981) (Rehnquist, J., dissenting).

[11] *See* 16 C.F.R. §§ 310.2(bb), (cc), 310.4(b)(1)(iii)(A), 310.6(a); 47 C.F.R. §§ 64.1200(c)(2), (f)(6)-(7), (f)(9)(iii). *See also* 18 FCC Rcd. at 14089. App. 712a. In this respect, this case raises a similar issue to that examined in *Nike v. Kasky*, 539 U.S. 654 (2003), to the extent it addressed

other publications are blocked by the DNCR, though this Court has held the First Amendment fully protects activities to promote circulation. *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938). Such anomalous applications of the rule are inconsistent with this Court's jurisprudence. When the government draws other types of discriminatory speech distinctions (even with respect to otherwise unprotected speech), underinclusiveness is fatal. *R.A.V. v. City of St. Paul,* 505 U.S. 377, 393 (1992) ("fighting words" may not be selectively regulated). Likewise, when government seeks to restrict noncommercial speech in order to protect people from unwanted intrusions, the First Amendment requires the regulation to be both content-neutral and to "target[] and eliminate[] no more than the *exact source* of the 'evil' it seeks to remedy." *Frisby v. Schultz,* 487 U.S. 474, 485 (1988) (emphasis added); *accord Hill,* 530 U.S. at 723, 726-27.

Because the issue presented by this case has not been resolved definitively, various circuit courts differ sharply on the proper application of *Discovery Network.* Like the District Court below, a number of appellate courts have interpreted *Discovery Network* as holding that even if banning a certain type of commercial speech would substantially advance a legitimate governmental interest, "it is unconstitutional to ban commercial speech but not noncommercial speech . . . absent a showing that the commercial speech has worse secondary effects." *Rappa v. New Castle County*, 18 F.3d 1043, 1074 n.54 (3d Cir. 1994); *Pearson v. Edgar*, 153 F.3d 397, 405 (7th Cir. 1998) ("we cannot say that the difference in value between commercial speech and noncommercial speech is as great as it was before *Discovery Network*"); *Outdoor Sys., Inc. v. City of Mesa,* 997 F.2d 604,

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when a commercial entity's speech may be subject to lesser First Amendment protection. Although certiorari in that case ultimately was dismissed as improvidently granted, the important reasons why review was granted in the first instance remain fully relevant.

610-11 (9th Cir. 1993) (the "principle enunciated in *Discovery Network*" is that government may not "discriminate between commercial and noncommercial speech" based on esthetics or safety); *accord Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995) (striking down preferential "safe harbor" that barred commercial broadcasters but not noncommercial broadcasters from airing "indecent" programs during certain hours because *Discovery Network* forbids government from "imposing different restrictions on each of two categories of [speakers] while failing to explain how this disparate treatment advance[s] its goal").

Here, the Tenth Circuit marginalized the reasoning in *Discovery Network* as if it were nothing more than a specialized application of *Central Hudson*. 358 F.3d at 1246. App. 28a-29a. Accordingly, this Court should use this case to clarify that more exacting scrutiny applies to government restrictions on truthful, nonmisleading commercial speech, at least when the government does not even "assert[] an interest in preventing commercial harms," *Discovery Network*, 507 U.S. at 426, or in "preserv[ing] a fair bargaining process." *44 Liquormart*, 517 U.S. at 501 (plurality opinion).

II. THE TENTH CIRCUIT MISCONSTRUED *CENTRAL HUDSON*'S INTERMEDIATE SCRUTINY TEST

Under *Central Hudson*, a restriction on commercial speech satisfies the First Amendment only if it directly and materially advances a substantial interest and is narrowly tailored to avoid restricting more speech than necessary. *Central Hudson*, 447 U.S. at 564. This Court has ruled that the government's burden of proof "is not satisfied by mere speculation or conjecture; rather, a body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real" and the regulation will advance the interest in a direct and material way. *Edenfield*, 507 U.S. at

770-71. "[A]necdotal evidence and educated guesses" are insufficient. *Rubin,* 514 U.S. at 490.

Contrary to the District Court's ruling and this Court's *Central Hudson* jurisprudence, the Tenth Circuit held that the DNCR sufficiently advanced the asserted interests. Review by this Court is thus warranted to correct the Tenth Circuit's misreading of the commercial speech cases. Such review is all the more important to keep "the starch in the standards" where, as here, "the daily politics cries loudest for limiting what may be said." *Denver Area Educ. Telecomms. Consortium v. FCC*, 518 U.S. 717, 774 (1996) (Souter, J. concurring).

A. The Tenth Circuit Misconstrued the "Material Advancement" Requirement

This Court has made clear in various commercial speech cases that "exemptions and inconsistencies bring into question [a law's] purpose," thereby precluding it from directly and materially achieving its objectives. *Rubin*, 514 U.S. at 489; *Greater New Orleans Broad. Ass'n*, 527 U.S. at 189. Nevertheless, despite exemptions for noncommercial calling, including political and charitable calls, as well as commercial calls under certain circumstances, the Tenth Circuit upheld the DNCR. It did so even while acknowledging that "[i]t is unclear from the record exactly how many telemarketing calls will be blocked by the do-not-call regulations." 358 F.3d at 1240 n.11. App. 18a. The District Court went even further in its characterization of the paucity of evidence, pointedly rejecting the government's estimate as a figure that "has crescendoed through the course of this lawsuit and taken on a life of its own with no reference to the factual record." 284 F.Supp.2d at 1269. App. 65a. It concluded "[t]here is nothing whatsoever in the administrative record or the record before this court, beyond the FTC's *ipse dixit*, to support this amalgam." *Id.*

The Tenth Circuit's conclusion that the government's showing was sufficient to satisfy *Central Hudson* is based on a misreading of this Court's decisions. It read *Discovery Network* as standing only for a minimal-impact principle—namely, that "a regulation that has only minimal impact on the identified problem cannot be saved simply because it targets commercial speech." 358 F.3d at 1245. App. 28a. The Tenth Circuit thus inferred, relying primarily on *United States v. Edge Broadcasting Company*, 509 U.S. 418 (1993), that "so long as a commercial speech regulation materially furthers its objectives" by applying to a substantial portion of the type of speech at issue, "underinclusiveness is not fatal under *Central Hudson*." 358 F.3d at 1239. App. 16a. The court reasoned that the DNCR's ban on commercial telemarketing speech—in contrast to the newsrack regulation in *Discovery Network*—applies to a "substantial" percentage of all telemarketing speech, and therefore satisfies *Central Hudson*, regardless of whether commercial calls are more "invasive of privacy" than noncommercial calls. *Id.* at 1240, 1244. App. 18a, 25a.[12]

Contrary to the Tenth Circuit's reasoning, the decision in *Edge*, which came three months after *Discovery Network*, did not in any way dilute the prohibition against banning only

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[12] The Tenth Circuit noted at a different point in its opinion that "the do-not-call registry's commercial/noncommercial distinction was based on findings that commercial telephone solicitation was significantly more *problematic* than charitable or political fundraising calls." *Id.* at 1241. App. 19a (emphasis added). But the only support the court cited for such "findings" was a single page from a single House Report that predated the DNCR rules by 12 years—a wholly inadequate basis in a legislative record upon which to draw distinctions that affect First Amendment rights. *Compare, e.g., Turner Broad. Sys. v. FCC*, 520 U.S. 180, 196-213 (1997). Significantly, the District Court found—and the Tenth Circuit did not dispute—that "unwanted calls seeking charitable contributions are as invasive to [] privacy . . . as unwanted calls from commercial telemarketers." 283 F.Supp.2d at 1166. App. 103a.

commercial speech when its impact on the asserted interests is no different or more severe than comparable noncommercial speech. Notably, *Edge* did not even concern a distinction between commercial and noncommercial speech, but rather one between two types of advertising. *See, e.g., Anderson v. Treadwell*, 294 F.3d 453, 464 (2d Cir. 2002) (*Edge* applies to challenges of a "distinction *among* categories of commercial solicitations, not between commercial and noncommercial solicitations"). Even so, the distinction among commercial speakers in *Edge* related directly to the interest in "supporting the policy of nonlottery States, as well as not interfering with the policy of States that permit lotteries." 509 U.S. at 426; *see also Greater New Orleans*, 527 U.S. at 194-195 & n.8 (*Edge* turned on advancing the government interest in supporting the policy of nonlottery states, not on reducing a portion of "undesirable" communications).[13]

The Tenth Circuit thus misconstrued *Discovery Network* and *Edge* to suggest that a commercial speech regulation that reduces 3 to 4 percent of a given problem is "paltry" but that a solution that addresses 11 percent of the problem represents a "material advancement" of the government's interest. But *Rubin* and *Greater New Orleans Broadcasting* could not have been decided as they were if *Central Hudson* required the government to show only somewhat more than a "paltry" impact on the problem. Like the situation here, each of these cases invalidated commercial speech regulations that were undermined by exemptions, and neither attempted to quantify how much of the problem was left unregulated by the exclusions.

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[13] To the extent *Edge* relied on *Posadas de Puerto Rico Assocs. v. Tourism Co.*, 478 U.S. 328 (1986), to suggest the government also had an interest in deterring advertising for a lawful but disfavored product, that principle is no longer good law. *See 44 Liquormart, Inc.*, 517 U.S. at 510 (plurality opinion); *Rubin*, 514 U.S. at 482 n.2, 489-91.

The Tenth Circuit's assumption that any calls blocked by the DNCR serve the government's purpose of preventing "unwanted" calls is not supported by the record. The FTC itself acknowledged the overbroad reach of the DNCR, which blocks all calls in a given category—including calls the consumer "would not mind receiving"—compared with the company-specific approach that precisely reflects individual preferences. 68 Fed. Reg. at 4636. App. 178a. Indeed, the record showed "consumers preferred a 'nuanced approach' to the 'do-not-call' issue, wanting to limit some calls to their household, but not all." *Id.* at 4593. App. at 214a. In this case, however, the agencies affirmatively avoided gathering the evidence needed to support the conclusion that calls blocked by the DNCR accurately reflect individual preferences. *E.g.*, 17 FCC Rcd. at 17479. App. 896a.

B. The Tenth Circuit Misconstrued the "Narrow Tailoring" Requirement

The Tenth Circuit also misconstrued *Central Hudson*'s dictate that if it could "achieve its interests in a manner that . . . restricts less speech, the Government must do so." *Thompson v. Western States Med. Ctr.*, 535 U.S. 357, 371 (2002); *see also Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 632 (1995) (if "obvious less-burdensome alternatives" would serve its interest as effectively, the government must use them). Under this requirement, the government must "carefully calculat[e] the costs and benefits associated with the burden on speech imposed." *Lorillard*, 533 U.S. at 561 (internal quotations omitted).

Here, the Tenth Circuit's conclusion that the DNCR was no more burdensome than necessary because it allows consumers to "opt in" to the registry ignored the record. Specifically, the FTC found that applying the DNCR to nonprofits was *not narrowly tailored* because it would not accurately reflect specific consumer preferences. Conversely, it found the

company-specific approach constitutional because there is a "direct correlation between the governmental interest and the regulatory means employed to advance that interest." 68 Fed. Reg. at 4636. App. 393a. The government justified disparate treatment of commercial and noncommercial calls based on "enforcement experience" and on the unsupported assertion that noncommercial callers have different "incentives" to comply with company-specific rules. However, the record reveals the government had no experience with enforcing the company-specific rules, and its assumptions regarding "incentives" were not backed either by evidence or logic. [14]

The Tenth Circuit uncritically accepted the FTC's conclusion that the company-specific rules were too "burdensome" because consumers "must repeat their 'do-not-call' request with every telemarketer" and because "many consumers find even an initial call . . . to be abusive and invasive of privacy." *Amended Rule*, 68 Fed. Reg. at 4629-30 (footnote omitted). App. 365a-369a. Contrary to this conclusion, however, the record showed that the company-specific rules were effective when invoked, and the overall volume of calls did not impose an unreasonable burden. [15] Nor did the

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[14] The FTC cited the unsubstantiated belief of one commenter that commercial telemarketers had a greater "incentive" than noncommercial callers to engage in abusive practices because the latter are interested in cultivating good will. 68 Fed. Reg. at 4637. App. 396a-397a. But the agency never discussed or disputed other record evidence that commercial telemarketers also strive to avoid alienating call recipients who may be potential future customers. *See, e.g.*, FTC File No. 411001, Comments of National Association of Advertisers, Apr. 15, 2002, at 1; Comments of SBC Communications, Inc., Apr. 18, 2002, at 4, ¶ 5.

[15] *E.g.*, *Telemarketing Sales Rule "Rule Review" Forum*, Matter No. P994414, at 7 (June 27, 2000) (National Consumer League comments). Comments cited by both the FTC and FCC filed by consumers who supplied specific data about their actual experiences of keeping logs of their telemarketing calls confirmed the number of calls was far from overwhelming under a company-specific approach. The data, collected over a two- and three-year period, showed that the commenters received,

court explain how the FTC could find that company-specific rules were appropriately tailored to protect consumer privacy in the noncommercial context where the agency had made no effort to determine whether the main concern was associated with commercial or noncommercial calls.[16]

The Tenth Circuit's conclusion also ignores case law holding that providing information about a given problem, and enforcing existing laws, are obvious less restrictive alternatives in any *Central Hudson* analysis. *See 44 Liquormart*, 517 U.S. at 507; *see also United States* v. *Playboy Entmt. Group, Inc.*, 529 U.S. 803, 817 (2000) (less restrictive but unpublicized option was not given a "fighting chance" and cannot become a meaningful alternative if not promoted). It also overlooked that other less restrictive changes to the FTC and FCC rules fully addressed any alleged shortcomings of the company-specific rules. The FTC added a rule prohibiting interference with efforts to be placed on companies' do-not-call lists, 16 C.F.R. § 310.4(b)(1)(ii), and rules governing abandoned calls and Caller ID address other problems the agencies identified in justifying the DNCR. *See e.g.*, 16 C.F.R. §§ 310.4(b)(1)(iv), 310.4(b)(4), 310.4(a)(7); 47 C.F.R. §§ 64.1200(a)(6), 64.1601(e).

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on average, just under one call to about 1.36 calls per week from all sources, including political and charitable organizations. Comments of Diana Mey, Apr. 24, 2000, in FTC File No. P994414 (cited at, *inter alia*, 68 Fed. Reg. at 4629, 4633, App. 364a-365a, 382a); Comments of Joe Shields, *Rules and Regulations Implementating the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, at Encl. A (Dec. 3, 2002) (cited at 18 FCC Rcd. at 14118, 14125, App. 763a, 773a).

[16] The FTC's own staff, in fact, testified just before the rulemaking began that "nonprofits [are] the biggest problem." *Telemarketing Sales Rule "Do-Not-Call" Forum*, Matter No. P994414, at 75 (Jan. 11, 2000).

III. THIS COURT SHOULD REVIEW WHETHER THE DNCR FEES VIOLATE THE FIRST AMENDMENT

Even if the DNCR were constitutional in general, its fee regime still violates the First Amendment. While the government may condition free speech on the payment of a fee "to meet the expense incident to the administration" of a legitimate regulation, *Cox v. New Hampshire,* 312 U.S. 569, 570-71 (1941) (parade supervision), it may not tax free speech in order to raise general-purpose revenue. *Murdock v. Pennsylvania,* 319 U.S. 105, 113-14 (1943); *accord National Cable Television Ass'n v. FCC*, 554 F.2d 1094, 1106 (D.C. Cir. 1976). This is particularly so when, as here, a tax discriminates among similarly situated speakers. *See Leathers v. Medlock*, 499 U.S. 439 (1991); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989); *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 583-584 & n.6 (1983).

The Tenth Circuit held "the do-not-call registry fees are to be used only to pay for expenses incident to the do-not-call registry," including "agency infrastructure and administration." 358 F.3d at 1247. App. 32a. But the "infrastructure and administration costs" paid by the fees include "the Consumer Sentinel System (the agency's repository for all consumer *fraud-related* complaints) and its attendant infrastructure." *Amended Fees Rule,* 68 Fed. Reg. at 45141 (emphasis added). App. 143a. As noted *supra*, fraud prevention has nothing to do with the DNCR's blanket bans on truthful, nonmisleading telemarketing calls. Indeed, most of the fees charged telemarketers appear to be devoted to a purpose unrelated to the "do-not-call" rules; the FTC is collecting $18.1 million at the same time it pays an outside contractor only $3.5 million to administer the DNCR. This Court should grant review to make clear that an agency may

not transform what is supposed to be "a payment for a . . . service rendered" into "a revenue measure" to garner funds the agency uses for more generalized purposes. *National Cable*, 554 F.2d at 1106.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

ROBERT CORN-REVERE *
RONALD G. LONDON
JEFFREY L. FISHER
KAVITA AMAR
SONJA WEST
DAVIS WRIGHT TREMAINE LLP
1500 K Street, N.W., Suite 450
Washington, D.C. 20005
(202) 508-6600

SEAN R. GALLAGHER
HOGAN & HARTSON LLP
1200 17th Street, Suite 1500
Denver, Colorado 80202
(303) 899-7300

* Counsel of Record

Counsel for Petitioners

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